IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE M.SASIDHARAN NAMBIAR

THURSDAY, THE 28TH JUNE 2007 / 7TH ASHADHA 1929

SA.No. 299 of 1993()

AS.211/1990 of DISTRICT COURT, THRISSUR
OS.60/1987 of SUB COURT,THRISSUR
.....

APPELLANT: APPELLANT:PLAINTIFF:

LONAPPAN,
S/O. THANIKKAL THOPPIL OUSEPH,
MANALUR VILLAGE AND DESOM,
THRISSUR TALUK.

***SINCE DIED. ADDL.APPELLANT IMPLEADED VIDE ORDER DATED 20/06/07 IN I.A.NO.747/07.**

***ADDL.APPELLANT: T.L.OUSEPH,**
S/O.LATE THANIKKAL LONAPPAN,
KANIAMPAL DESOM, KUNNAMKULAM,
THRISSUR DISTRICT.

BY ADV. SRI.N.P.SAMUEL

RESPONDENTS: RESPONDENTS:DEFENDANTS:
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1. VISWAMBHARAN,
S/O.KANIYAMPARAMBIL AYYAPPAKUTTY,
PALAZHI DESOM, KARAMUCK VILLAGE,
THRISSUR TALUK.

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2. JANAKY,
D/O. POOKKATTIL KOCHUNNY,
PALAZHI DESOM, KARAMUCK VILLAGE,
THRISSUR TALUK.

3. *SULOCHANA,
D/O.KEERAPADATHU KOCHUKUTTAN &
KANIYAMPARAMBIL RAMADASAN,
PALAZHI DESOM, KARAMUCK VILLAGE,
THRISSUR TALUK. - *SINCE DIED. R1 AND R2 ARE DECLARED SUFFICIENT TO PROTECT THE INTERESTS OF R3 VIDE ORDER DTD. 20/06/07 IN I.A.749/07.

BY ADV. SRI.K.P.VIJAYAN
SRI.V.B.JINNAH
SRI.P.K.ALEXANDER VAIDIAN
SRI.BOBY MATHEW

THIS SECOND APPEAL HAVING BEEN FINALLY HEARD ON 28/06/2007, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

M.SASIDHARAN NAMBIAR, J.

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S.A.No. 299 OF 1993

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DATED THIS THE 28th DAY OF JUNE, 2007

JUDGMENT

Plaintiff in O.S.60 of 1987 on the file of Sub Court, Thrissur is the appellant. Defendants are respondents. Appellant instituted the suit seeking realisation of Rs.15,000/- paid as advance under Ext.A1 agreement for sale. It was alleged that respondents executed Ext.A1 agreement agreeing to sell the property for a consideration of Rs.25,200/- and Rs.15,000/- was received as advance and subsequently the period for performance of agreement was extended twice and still respondents did not execute the sale deed and therefore appellants sent Ext.A2 notice demanding execution of the sale deed but under Ext.A3 reply existence of the agreement was disputed and therefore suit was filed seeking realisation of the advance amount paid.

2. Respondents in their written statement contended that they did not enter into any agreement for sale. According to them even before the alleged date of agreement, the property was sold by them to one of the friends of the appellant himself which was known to the appellant and Ext.A1 agreement was

concocted after receipt of Ext.A3 reply notice. Respondents also contended that if there was a written agreement it would have been mentioned in Ext.A2 notice and they did not receive any amount and therefore appellant is not entitled to the decree sought for.

3. Before the trial court, first appellant was examined as PW1 and his son was examined as PW4 and the scribe of Ext.A1 was examined as PW3 and witness to the document was examined as PW2. First respondent was examined as DW1 and his brother as DW2. Learned Sub Judge, on appreciation of evidence, found that Ext.A1 agreement was not executed by respondents and there is no acceptable evidence to prove that respondents received Rs.15,000/.- as claimed by the appellant. Therefore suit was dismissed. Appellant challenged the decree and judgment before District Court, Thrissur in A.S.211 of 1990. Learned District Judge, on reappreciation of evidence confirmed the finding of learned Sub Judge and dismissed the appeal. It is challenged in the second appeal.

4. Second appeal was admitted formulating the following substantial questions of law.

i) When the handwriting contained in part of the document is admitted by the defendants and execution of the document is denied, should not the defendants explain how handwriting happened to be there in the document

ii)Whether courts below were correct in not comparing the admitted signature with the disputed signature in Ext.A1 under Section 73 of the Evidence Act.

5. Learned counsel appearing for the appellant and respondent were heard.

6. Ext.A2 notice was sent by appellant before institution of the suit demanding specific performance of the agreement for sale. In Ext.A2 notice no mention was made about a written agreement for sale. There was no allegation in Ext.A2 notice that before the expiry of the period originally fixed, the period was extended either once or twice. The existence of a written agreement for sale was mentioned for the first time in the plaint. Defendants in the written statement itself contended that they did not execute Ext.A1 agreement. In Ext.A3 reply agreement was denied. In the written statement they also contended that Ext.A1 agreement was concocted after receipt of Ext.A3 reply.

In such circumstances, in the normal course, appellant should have sent Ext.A1 agreement to a handwriting expert to get the signatures compared with the admitted signatures of respondents. Appellants did not take any steps. True, even without the aid of an expert, execution of a document could be proved. Appellant examined PW3, the scribe and PW2, the attesting witness. Trial court which had the advantage of seeing the witness and noting their demeanour did not believe either PW2 or PW3. First appellate court also appreciated the evidence and disbelieved their evidence. This court cannot be the third tier of fact finding authority. The evidence cannot be reappreciated and this court cannot substitute the findings of the courts below to the findings of this court.

7. Courts below had given cogent reasons for holding that execution of Ext.A1 agreement was not proved. Courts below also found that there is no evidence to prove that respondents received Rs.15,000/- as contended by the appellant. Though learned counsel appearing for appellant vehemently argued that evidence of DW1 where the signature on the reverse side of Ext.A1 was admitted was not properly considered, I cannot

agree. In exercise of the powers of this court under Section 100 of Code of Civil Procedure, the evidence cannot be reappreciated to interfere with the concurrent finding of fact. There is no merit in the appeal. Appeal is dismissed.

M.SASIDHARAN NAMBIAR, JUDGE

lgk/-